EU-Regulation

# DIGITAL MARKETS ACT – PART II ENFORCEMENT AND GOVERNANCE

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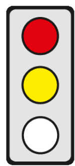
## KEY ISSUES

**Background:** Digital platforms bring benefits for users and create business opportunities. However, as a result of their position between business users and end users, a few large platforms ("gatekeepers") enjoy significant market power which allows them to capitalise on economic dependence and limit opportunities for competitors to enter the market.

**Objective of the Regulation:** The Digital Markets Act (DMA) aims to ensure that competitors can enter digital markets and that relationships between gatekeepers and their users are fair. To this end, the DMA contains obligations for providers of platform services [cep**PolicyBrief 14**/2021] as well as enforcement and governance rules [this cep**PolicyBrief**].

**Affected parties:** Gatekeepers and their end users and business users.



**Pro:** Enforcement at EU level avoids divergent application of the DMA.

**Contra:** (1) National authorities should not be left out when it comes to enforcing the DMA.

(2) The Commission's power to create new obligations for gatekeepers through delegated acts is a breach of EU primary law.

(3) The DMA does not adequately clarify its relationship to national law.

The most important passages in the text are indicated by a line in the margin.

## CONTENT

### Title

**Proposal COM(2020) 842** of 15. December 2020 for a **Regulation on contestable and fair markets in the digital sector**

### Brief Summary

- **Background and obligations**
  - The Digital Markets Act (DMA) aims to ensure contestable and fair digital markets by imposing strict conduct obligations on certain providers of "core platform services" (CPS) defined as "gatekeepers". CPS include online intermediation services, online search engines, and operating systems [Art. 2 (2), for a full list see cep**PolicyBrief** 14/2021].
  - A "gatekeeper" is a CPS provider that meets specific criteria which are deemed to be fulfilled if certain quantitative thresholds – such as for user numbers and turnover – are met [Art. 3 (1), (2); for details see cep**PolicyBrief** 14/2021].
  - The DMA proposal contains
    - obligations for gatekeepers [see cep**PolicyBrief** 14/2021] and
    - enforcement and governance rules [this cep**PolicyBrief**].

- **Market investigation and investigative powers**
  - The Commission may conduct a market investigation in order to
    - identify further CPS provided by the undertaking to which the gatekeeper belongs [Art. 15 (1)],
    - examine whether a CPS provider that does not meet the quantitative thresholds should be designated as a gatekeeper and made subject to
      - all obligations for gatekeepers if it has already acquired an entrenched and durable position [Art. 15 (1)] or
      - only certain "appropriate and necessary" obligations in order to prevent it from acquiring an entrenched and durable position in the near future by "unfair" means [Art. 15 (4)].

        In the latter case, some or all of the following obligations may be imposed on the provider:
        - The provider must allow business users to offer the same products or services to end users through third-party online intermediation services under different conditions to those offered through its online intermediation services [Art. 5 (b)].
        - The provider must refrain from technically restricting the ability of end users to switch between and subscribe to different apps and services that are accessed through its operating system [Art. 6 (1) (e)].
        - The provider must allow business users and providers of ancillary services, e.g. identification or payment services, access to and interoperability with the operating system, hardware and software features that are used by its own ancillary services [(Art. 6 (1) (f)].

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  - The provider must provide business and end users with portability of the data generated through their activity, in particular with tools for end users to facilitate the exercise of data portability through continuous real-time access [Art. 6 (1) (h)].
  - The provider must provide business users cost-free with effective, high-quality, continuous and real-time access to data that is provided for or generated by them and their end users in the context of the use of the CPS and enable them to use such data [Art. 6 (1) (i)].
- Following a market investigation, the Commission may, through delegated acts, update the obligations for gatekeepers in order to address practices that impede contestability of CPS or fairness [Art. 10 (1)].
- The Commission may
  - require undertakings to submit all necessary information, including for the purpose of monitoring, implementing and enforcing the rules of the DMA [Art. 19 (1)],
  - demand access to data bases and algorithms of undertakings [Art. 19 (1)] and
  - conduct on-site inspections at the premises of an undertaking [Art. 21 (1)]; during on-site inspections, the Commission may require the undertaking to provide access to and explanations on its organisation, functioning, IT system, algorithms, data-handling and business conduct [Art. 21 (3)].

► **Measures in case of non-compliance**

- In case of urgency due to a risk of serious and irreparable damage for business users or end users of gatekeepers, the Commission may order interim measures, based on a "prima facie", i.e. preliminary, finding of an infringement of the conduct obligations [Art. 22]. The Commission may carry out proceedings into whether a gatekeeper complies with the interim measures [Art. 18, Art. 25 (1) (d)].
- The Commission may take proceedings to find out whether a gatekeeper complies with the conduct obligations [Art. 18, Art. 25 (1) (a)]. During these proceedings, a gatekeeper can offer commitments that ensure effective compliance with the conduct obligations [Art. 23 (1)]. If a gatekeeper does not offer sufficient commitments or does not comply with them, the Commission will adopt a non-compliance decision [Art. 23 (3), Art. 25 (1) (e)].
- If at least three non-compliance decisions have been issued against a gatekeeper within a period of 5 years [Art. 16 (1), (3)], the Commission may impose behavioural or structural remedies on it, e.g. unbundling, unless the gatekeeper offers effective commitments [Art. 23 (1)]. If a gatekeeper does not comply with the behavioural or structural remedies, the Commission will adopt a non-compliance decision [Art. 25 (1) (e)].
- The Commission's non-compliance decisions
  - order the gatekeeper to cease and desist from its non-compliance [Art. 25 (3)] and
  - may include fines of up to 10% of the gatekeeper's annual turnover [Art. 26 (1)].
- The Commission may impose periodic penalty payments of up to 5% of the undertaking's average daily turnover in order to compel it to (Art. 27):
  - submit to an on-site inspection or
  - comply with
    - an information request or request for access to data bases and algorithms;
    - its commitments made binding by the Commission;
    - the cease and desist order of a non-compliance decision; or
    - behavioural or structural remedies imposed.

► **Role of Member States**

- A Digital Markets Advisory Committee will be established consisting of Member State representatives. It may issue opinions on, inter alia, individual decisions taken by the Commission. (Art. 32)
- Three or more Member States may request the Commission to open a market investigation.
- The DMA prohibits Member States from imposing or having in place obligations on gatekeepers, additional to those of the DMA, with the purpose of ensuring contestable and fair markets [Art. 1 (5)];
- The DMA does not prohibit Member States from imposing or having in place "national competition rules" that ban [Art. 1 (6)]
  - anticompetitive agreements, abuses of dominance, such as national competition law that corresponds to Art. 101 and 102 TFEU, or
  - other forms of unilateral conduct insofar as these national rules
    - are applied to undertakings other than gatekeepers or
    - result in imposing additional obligations on gatekeepers that have a purpose other than ensuring contestable and fair markets.
  - In particular, national measures are not prohibited if they [Recital 9]
    - are based on an individualised assessment of the market positions and behaviour of an undertaking, including its likely effects and the precise scope of the prohibited behaviour, and
    - allow the undertaking in question to raise efficiency and objective justification arguments.

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## Statement on Subsidiarity by the Commission

Digital players, notably those targeted by the DMA, operate across borders. Thus, the problems to be solved arise across borders and affect several Member States.

## Policy Context

The DMA builds on the Commission's consultations on the "New Competition Tool" and the "ex-ante regulatory instrument for large online platforms with significant network effects acting as gatekeepers" (see cep**Input** of 24 November 2020). Together with the Digital Services Act (see cep**Study**; cep**PolicyBriefs** to follow), which was released on the same day, the DMA forms part of the Commission's proposal on new rules for digital platforms.

## Legislative Procedure

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| 15 December 2020 | Adoption by the Commission |
| Open | Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force |

## Options for Influencing the Political Process

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| Directorates General: | DG Communications Networks, Content and Technology, |
| Committees of the European Parliament: | IMCO (leading), Rapporteur: Andreas Schwab (EPP Group, Germany) |
| Federal Germany Ministries: | Economic Affairs (leading) |
| Committees of the German Bundestag: | Economic Affairs (leading) |
| Decision-making Mode in the Council: | Qualified majority (acceptance by 55% of Member States which make up 65% of the EU population) |

## Formalities

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|---|---|
| Competence: | Art. 114 TFEU (Internal Market) |
| Type of Legislative Competence: | Shared competence (Art. 4 (2) TFEU) |
| Procedure: | Art. 294 TFEU (ordinary legislative procedure) |

# ASSESSMENT

## Economic Impact Assessment

For an assessment of the definition of gatekeepers and of the conduct obligations see cep**PolicyBrief** 14/2021.
Obligations for CPS providers, who do not meet the quantitative thresholds but might be able to force competing providers out of the market or prevent them from entering the market by using "unfair" means, may protect competition.
However, the results of the market investigations, that are necessary in order to assess this question, involve a high degree of uncertainty. Therefore, conduct obligations should only be imposed on CPS providers if the market investigation clearly shows that without conduct obligations a CPS provider would become a gatekeeper.
The fact that CPS providers, who do not yet have an entrenched and durable position, can only be subject to such conduct obligations as are necessary to prevent them from acquiring such a position by "unfair means", avoids overburdening the undertakings concerned.
The right to impose behavioural and structural remedies interferes significantly with the freedom to conduct a business. Therefore, it is appropriate that it is only provided as a last resort, to correct the negative impact on the internal market of repeated non-compliance with the DMA.

## Legal Assessment

### Legislative Competence of the EU

The DMA is rightly based on the internal market competence (Art. 114 TFEU).

### Subsidiarity

Unproblematic.

### Proportionality with Respect to Member States

Placing responsibility for enforcement in the hands of the Commission, while Member States are merely given an advisory role, is problematic. Since the DMA by definition only applies to undertakings that are active in at least three

different Member States, there is always a cross-border component. Consequently, **enforcement at EU level avoids divergent application of the DMA**. **However, to ensure swift enforcement – which is particularly important in fast-paced digital markets – national authorities,** with their manpower and expertise on digital markets already established, **should not be left out** entirely **when it comes to enforcing the DMA.**

To avoid conflicts arising from diverging interpretations, the Commission should be responsible for specifying the implementation of obligations, carrying out market investigations, the imposition of behavioural or structural remedies, and conducting investigations into possible violations of the DMA that concern more than one Member State. National authorities should be given the competence to monitor domestic compliance with the DMA and investigate possible violations that only concern their own country, as well as to act as a contact point for users wishing to complain about a gatekeeper's behaviour.

The involvement of national authorities in the enforcement of the DMA would require a system of coordination between national authorities and the Commission, similar to the European Competition Network. Notably, national authorities would have to be obliged to notify the Commission when they take up new cases and the Commission would have to be able to take up cases itself where national authorities are investigating the same issue.

### Compatibility with EU Law in Other Respects

**The Commission's power to create new obligations for gatekeepers through delegated acts is a breach of EU primary law.** The Commission may only adopt delegated acts to supplement or amend certain non-essential elements of the legislative act (Art. 290 TFEU). The obligations imposed on gatekeepers, however, lie at the very heart of the DMA and, thus, cannot be considered non-essential elements.

**The blanket right accorded to the Commission to carry out on-site inspections, without any specification of conditions** (Art. 21)**, is a violation of the Charter of Fundamental Rights**: Art. 52 (1) CFR requires that a provision of law be sufficiently clear and precise regarding the scope and application of the measure in question in order to be able to justify an interference with a fundamental right (CJEU Joined Cases C-293/12 and C-594/12, Digital Rights Ireland, para. 54). There should at least be an indication, as in competition law enforcement (Regulation 1/2003), that the Commission may only use this power in order to carry out the duties assigned to it under the DMA.

### Impact on and Compatibility with German Law

**The DMA does not adequately clarify its relationship to national law.** It remains unclear when a national measure is a competition rule giving Member States the right to impose additional obligations on gatekeepers [Art. 1 (6)], and when it is a rule intended to ensure contestable and fair markets, which does not give Member States the right to impose additional obligations on gatekeepers [Art. 1 (5)]. Given that § 19a of the Act against Restraints of Competition ("GWB") does not impose a set list of obligations on undertakings of paramount significance for competition across markets, but instead requires the Federal Cartel Office to carry out an assessment of which obligations to impose on each individual undertaking, and allows the undertakings to raise objective justification arguments, it appears to be a national competition rule according to Art. 1 (6) DMA. Thus, the Federal Cartel Office could impose obligations on gatekeepers that are based on § 19a GWB and go beyond the obligations of the DMA, as well as imposing obligations based on § 19a GWB on undertakings that are not gatekeepers. The DMA must, however, be clarified on this point.

## Summary of the Assessment

Enforcement at EU level avoids divergent application of the DMA. However, to ensure swift enforcement – which is particularly important in fast-paced digital markets – national authorities should not be left out when it comes to enforcing the DMA. The Commission's power to create new obligations for gatekeepers through delegated acts is a breach of EU primary law. The blanket right accorded to the Commission to carry out on-site inspections, without any specification of conditions, is a violation of the Charter of Fundamental Rights. The DMA does not adequately clarify its relationship to national law.

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